



COVAD
COMMUNICATIONS COMPANY

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February 18, 1999

Ms. Magalie Roman Salas
Secretary, Federal Communication Commission
445 12th Street, N.W.
Washington, DC 20554

Re: Ex Parte Presentation of Covad Communications Company in CC
Docket No. 98-147, *In the Matter of Wireline
Services Offering Advanced Telecommunications Capability*, and
CC Docket No. 96-98, *In the Matter of Implementation of Sections
251 and 252 of the Telecommunications Act of 1996*.

Dear Ms. Salas,

On February 17, 1999, James D. Earl and Thomas M. Koutsky of Covad Communications Company met with Johnthan Askin, Stag Newman, Doug Sicker, and Jeff Lanning to discuss issues related to the attached documents, which are highly relevant to the above-referenced proceedings.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.206(a)(2) of the Commission's rules.

Sincerely,

Thomas M. Koutsky
Assistant General Counsel
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List A B C D E

PROPOSED STANDARDS FOR ACCESS TO UNBUNDLED NETWORK ELEMENTS

The Commission's determination of unbundled network elements pursuant to Section 251(d)(2) must be guided by the reasons Congress required unbundled elements in the first place.

Congress required incumbent LECs to unbundle their networks because those networks afforded the then monopoly providers accumulated economies of scale, scope, density and connectivity. Congress rightly perceived that the sheer ubiquity of incumbent LEC networks conferred upon the incumbents a uniquely advantageous market position -- one incapable of replication. Congress was rightly concerned that incumbent LECs would use their ubiquitous networks to maintain and extend their monopoly into related integrated services, thereby precluding the competition that the Act sought to enable.

Since the incumbent LECs built unique networks while regulated and protected monopolies, Congress required that incumbent LECs—through unbundling and interconnection—share the accumulated economies of scale, scope, density and connectivity with competitive carriers. This was the also the vision of the Section 271 checklist—once RBOCs demonstrated that they were sharing the inherent value of their ubiquitous networks with competitors, those RBOCs would be permitted to compete in all telecommunications markets.

The reasons Congress required unbundling have not changed. Indeed, developments over the past three years validate Congressional insight. When incumbent LECs argue that the FCC's unbundling rules should permit them to unilaterally exploit the ubiquity of their networks to the exclusion of competitors,¹ they are demonstrating the continuing threat to nascent competition Congress sought to avoid. Simply put, incumbent LECs must be required to share the efficiencies generated by those ubiquitous networks if competition is to become and remain viable.

The "necessary" and "impair" standards should encapsulate the congressional purpose for unbundling. CLECs must obtain elements of ILEC networks so they are not comparatively disadvantaged by the benefits of the economies of scale, scope, density and connectivity inherent in ubiquitous ILEC networks. If the economies of scale, scope, density and connectivity associated with a particular network element either (1) do not exist, or (2) can be economically replicated without obtaining access to the ILEC network, the need for unbundling that element is diminished.

The principal terminology determining the interpretation of Section 251(d)(2) include the following:

¹ For instance, when an ILEC argues that it should be free to deploy "loop electronics" or remote terminal without unbundling that electronics or RT equipment because it is an efficient provider of those electronics or equipment.

Whether an element is "proprietary." A network element should be considered to have a "proprietary" component only if the proprietary interest *does not* derive from the incumbent LEC's status as an incumbent, ubiquitous provider of local telecommunications services.

One simple example of a potential "proprietary" element that should *not* be conferred such status is loop and rights-of-way information. By virtue of their incumbent status (They were the only companies constructing copper loops in their respective areas), the incumbent LECs have a tremendous amount of information about the quality of their outside plant, including the location and types of electronics on that plant and the manner and route over which it is constructed. Since that information was gained or developed by an incumbent LEC as a result of its monopoly status, the incumbent LEC should *not* be permitted to claim that such information is now "proprietary" and that CLEC access to that information is restricted. It was precisely that type of information and knowledge base that Congress intended to be provided to CLECs through the unbundling process.

Whether "access" to a proprietary element is "necessary." After the Commission interprets the term "proprietary" as described above, the Commission will need to describe an embedded class of such elements or components that may still be necessary for requesting carriers to obtain from the incumbent LEC. In establishing this standard, the Commission must remember that Section 3(29) of the Act defines an unbundled network element as including the full "features, functions and capabilities" of a facility. Therefore, one potential 251(d)(2)(A) standard would describe access to a network element that has a proprietary component as "necessary" if denying access to the proprietary aspect would cause a material loss in the functionality of the network element and if the requesting carrier's ability to provide the intended service would otherwise be impaired in accordance with 251(d)(2)(B).

Whether the "failure to provide access" to an element "would impair" a CLEC's provision of a telecommunications service. It is critical that the Commission construe Section 251(d)(2)(B) in a manner that does not write out of the Act Congress's clear desire that CLECs be permitted to obtain unbundled, non-discriminatory access to the economies of scale, scope, density and connectivity of incumbent LEC networks. The simple existence of a "substitute" element from a non-ILEC supplier is *not* sufficient to satisfy the Congressional requirement. At a minimum, the substitute element must be available with the same efficiencies of scale, scope, density and connectivity as the ILEC-supplied element. Otherwise, the Commission will fail to match the remedy with the purpose for which unbundling is statutorily required.

Read in this light, the proper "impair" standard is actually quite simple to articulate: A carrier is impaired if a failure to obtain access to a network element from the incumbent LEC would impose a material increase in cost, a material delay, or would materially restrict the number or scope of customers likely to receive the service any requesting carrier seeks to offer. The Commission should consider certain presumptions of impairment—that is, if an element exhibits any material economies of scale, scope,

density, or connectivity, the Commission should presume that the failure to provide non-discriminatory access to that element would impair the ability of requesting carriers to provide its services.²

The Commission also must ensure that the impairment standard be undertaken without reference to particular "types" of telecommunications services. Section 251(d)(2)(B) clearly states that the impairment standard applies to whatever services a requesting carrier "seeks to offer". As a result, the Commission cannot lawfully adopt a "dial-tone" orientation in establishing UNEs, in which UNEs used for voice services somehow become more "important" than UNEs used for data services. Incumbent LECs have attempted to place these restrictions in the use of UNEs before—particularly Bell Atlantic in New York, where it has restricted access to its "extended link" element only to carriers that pledge to provide analog dial-tone services. ILECs should not be permitted to utilize this proceeding in order that the FCC confirm what type of competition is acceptable for ILECs to confront.

* * *

Finally, the Commission must not forget that it is not restricted to the "necessary" and "impair" standards when it identifies elements pursuant to Section 251(d)(2). In fact, the statutory language only states that the Commission shall consider "at a minimum" the "necessary" and "impair" standards. The words "at a minimum" clearly contemplate that the Commission consider additional access factors in its determination.

Therefore, the Commission could also consider the need for creating a list of elements available nationwide without reference to local conditions. In articulating a national access standard, the Commission would promote the development of competition by providing a relatively stable national playing field upon which CLECs could design their networks and develop business plans. Few things would hinder national deployment of advanced services more than requiring CLECs to design different types of networks in different cities in order to provide a ubiquitous connectivity solution. The consideration of measures necessary to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" is clearly contemplated by the legislation that created the need to determine what elements are to be unbundled.

² This proposal is consistent with—and draws a great deal—from the proposal circulated by CompTel on February 12, 1998.

**BEFORE THE
VIRGINIA STATE CORPORATION COMMISSION**

Petition of DIECA Communications)	
Inc. d/b/a Covad Communications)	
Company for Arbitration of)	
Interconnection Rates, Terms,)	Docket No. _____
Conditions and Related)	
Arrangements with GTE)	

**PETITION FOR ARBITRATION OF INTERCONNECTION RATES,
TERMS, CONDITIONS AND RELATED
ARRANGEMENTS WITH
GTE.**

DIECA Communications Inc. d/b/a Covad Communications Company ("Covad") hereby petitions the Virginia State Corporate Commission ("Commission") for arbitration to establish an Interconnection Agreement between Covad and GTE. ("GTE") pursuant to Section 252(b) of the Communications Act of 1934, as amended (the "Act").¹ DIECA is a Virginia Corporation authorized to do business in Virginia, with its principal office and place of business at 6849 Old Dominion Dr., Suite 220, McLean, VA. Covad Communications Company and DIECA are wholly owned subsidiaries of Covad Communications Group, Inc., and are affiliates of one another. Covad seeks the Interconnection Agreement to govern the rates, terms and conditions for interconnection and related arrangements between the parties. In support of this Petition, and in compliance with the requirements of Section 252, Covad provides the following information and documentation.

¹ 47 U.S.C. § 252(b) (*added by* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)) ("the Act").

I. IDENTITY OF THE PARTIES

Covad is a Silicon Valley-based, start-up competitive local telecommunications service provider ("CLEC"), founded after the passage of the Telecommunications Act of 1996. Covad is incorporated in California, with its principal place of business at 2330 Central Expressway, Building B, Santa Clara, CA 95050. Covad has recently been granted a certificate of public convenience and necessity to provide local exchange and exchange access services in Virginia.

Covad was created with a single objective -- to deploy DSL technology² widely and to provide reliable, high-bandwidth, "always-on" services in order to meet the enormous and exponentially growing demand for data and personal computer communications services. DSL technology permits Covad to provide two-way, high-speed data (at speeds ranging from 144 kbps to 6 mbps, and even higher) over a single twisted copper pair. Covad provides DSL services on a commercial basis in the San Francisco Bay Area and the metropolitan areas of Los Angeles, Boston, Seattle, New York, and Washington D.C. over a rapidly expanding network that currently passes over 5 million homes, businesses, hospitals, schools and libraries. Unlike many other CLECs, Covad's facilities-based network extends broadly to residential and less densely populated areas.

Covad wants to bring these services to the citizens of Virginia. Our focus is to provide high-speed, secure data communications enabling corporations to connect their employees at home to the corporate local area network ("LAN") and also to provide DSL services that Internet Service Providers ("ISPs") will resell to small and mid-sized businesses and other Internet

² Covad uses the term "DSL" to cover the range of variants of digital subscriber line ("DSL") technologies that enable the provision of different combinations of symmetric and asymmetric high-speed data and basic POTS ("plain old telephone service") telecommunications transmission services over copper loops. These variants include High bit rate Digital Subscriber Line, VDSL, IDSL and RADSL technologies.

consumers. Covad's network build-out will include significant residential and even rural portions of Virginia because this is where many small businesses are located and where many remote workers of companies located in the metropolitan areas of Virginia live. Covad's innovative services are precisely the type of competitive service offerings that the Telecommunications Act of 1996 was intended by Congress to facilitate.

Covad's business entry strategy depends upon collocation in central offices on a blanket-area basis, which will facilitate Covad's access to the ubiquitous copper loop plant of incumbent local exchange carriers on an unbundled basis. Covad has concluded an interconnection agreement with Bell Atlantic for service in Virginia. However, because Virginia citizens are served by multiple incumbent local exchange carriers, it is impossible for Covad to offer its next-generation services to *all* Virginia citizens in a timely manner unless and until it has an effective Interconnection Agreement with GTE.

GTE has identified itself as follows in its joint merger application with Bell Atlantic before the FCC:³

GTE is a global communications and media company that provides a range of services in the United States and select countries around the world. The company provides local telephone service in 28 states and provides wireless services, nationwide long-distance services, Internet services, as well as video services in selected markets. GTE also has significant investments in communications and information services businesses in Canada, the Dominican Republic, Venezuela, Argentina, Micronesia and China. GTE is also engaged in financing, insurance, leasing and other related activities.

For the purposes of interconnection agreements, GTE has identified its address to Covad as that of its corporate headquarters at 600 Hidden Ridge Drive, Irving, Texas 75038. Covad believes that, ultimately, an interconnection agreement in Virginia would be concluded with GTE

³ See, http://www.fcc.gov/ccb/Mergers/BA_GTE/application/coverapp.pdf

South Incorporated, having an office at Three James Center, 1051 East Cary Street, Suite 1200, Richmond, VA 23219; however, Covad has yet to be so informed by GTE.

II. Background

Covad and GTE have been engaged in interconnection negotiations for over a year. Notwithstanding the extreme disparity in bargaining power between Covad and GTE, reasonable progress was being made in narrowing outstanding differences—until January 25, 1999, the date on which the Supreme Court ruled in *AT&T Corp. v. Iowa Util. Bd.*, Nos. 97-826 *et al.*, ___ U.S. ___ (Jan. 25, 1999) (hereinafter “*Iowa*”). Since that date, GTE negotiators have been unwilling and/or unable to discuss substantive issues with Covad, especially on critical terms such as pricing and availability of unbundled network elements and physical collocation terms. GTE negotiators have given Covad the understanding that GTE has suspended these negotiations, pending its internal review of the *Iowa* decision.

Prior to GTE’s cessation of negotiations in the past few weeks, Covad and GTE were negotiating this Virginia contract in the context of interconnection negotiations between Covad and GTE in several states, including Oregon. Before the *Iowa* decision, Covad and GTE had agreed that the terms of the interconnection agreement and related agreements negotiated for Oregon would become the model for interconnection agreements in other states, making such adjustments as were appropriate in light of any different conditions and state regulatory requirements. Covad has negotiated in good faith, and will continue to do so, not only as regards interconnection in Oregon, North Carolina, Florida and Virginia, but in all states where GTE is an incumbent LEC.

Covad is initiating this arbitration proceeding because it—and state and federal regulators—cannot stand idly by while GTE decides whether or not to comply with the Telecommunications Act of 1996. Covad specifically requested interconnection negotiations with GTE in Florida, Virginia and North Carolina on September 9, 1998 (Attachment 1).⁴ The North Carolina Utilities Commission has made it abundantly clear that it regards the interconnection negotiation and arbitration periods set forth in Section 252 of the Act to be unalterable.⁵ Covad's filing of this arbitration petition is within the statutory window set forth in Section 252(b)(1).⁶

As a result, Covad—and the citizens of Virginia that Covad wants to serve—have a statutory right for this Commission to resolve these significant unresolved issues by June 9, 1999. Covad is filing contemporaneous arbitration petitions with GTE in North Carolina and Florida—a demonstration of the imperative that Covad assigns to its desire to begin network construction in all of these states.

This arbitration petition sets forth Covad's understanding of the status of the law after the *Iowa* decision and explains its belief that this Commission can and should swiftly rule—as a matter of law—to resolve the unresolved issues described herein. In particular, Covad requests that the Commission order the adoption of FCC pricing and proxy rates for unbundled loops in the Covad-GTE interconnection agreement. The legality and enforceability of these standards was explicitly affirmed by the Supreme Court in the *Iowa* case and those rules are now the law of

⁴ This request was made in the context of Covad's and GTE's on-going negotiations in Oregon and other states.

⁵ North Carolina Order Regarding Timing of Arbitrations, Docket No. P-100, SUB 133.

⁶ Covad calculates that the arbitration window closes on Tuesday, February 16, 1999. The North Carolina Utilities Commission has effectively prohibited parties from voluntarily extending the arbitration window.

the land.⁷ Covad believes that these arbitration proceedings can be resolved without factual findings or discovery.

III. STATUS OF THE LAW

These negotiations have taken place pursuant to Sections 251 and 252 of the Act. On August 8, 1996, the Federal Communications Commission ("FCC") issued rules and regulations that implemented those provisions.⁸

On January 25, 1999, the Supreme Court affirmed these FCC rules, with the exception of rule 51.319, which the Court vacated. This decision essentially reversed June 21, 1997 and October 14, 1997 decisions by the United States Court of Appeals for the Eighth Circuit that vacated several portions of the *FCC Local Competition Order*.

The Supreme Court ruled that the law "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies."⁹ More specifically, the Court held that the Commission had jurisdiction to design a pricing methodology for unbundled network elements and decided that the FCC's rules governing unbundled access are, with the exception of Rule 319¹⁰, consistent with the 1996 Act.

⁷ Covad understands that the Supreme Court decision in *Iowa* will officially become effective on February 19, 1999, the date on which the timing for petitions for rehearing will expire. To date, no petition for rehearing has been filed.

⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCCR 15499 (1996) (subsequent history deleted) (hereinafter "*FCC Local Competition Order*").

⁹ *Iowa* at 12.

¹⁰ 47 C.F.R. §51.319, Specific Unbundling Requirements.

As a consequence of the *Iowa* decision, a substantial portion of the cloud over the FCC pricing rules¹¹ has been lifted.

Even though the Supreme Court vacated Commission Rule 51.319 (Specific Unbundling Requirements), dozens of other FCC rules remain unaffected by that decision and remain the law of the land. Of relevance to this arbitration are the following:

- GTE's obligation to "negotiate in good faith," including the FCC's interpretation that "[i]ntentionally obstructing or delaying negotiations" qualifies as a failure to negotiate in good faith. 47 C.F.R. § 51.301(a), (c)(6).
- GTE's obligation to provide Covad with "nondiscriminatory access" to unbundled network elements, 47 C.F.R. § 51.307(a), and GTE's obligation to offer access to UNEs "equally to all requesting telecommunications carriers." 47 C.F.R. § 51.313(a).¹²
- GTE's obligation to provide collocation to Covad. 47 C.F.R. §§ 51.321, 323.
- The FCC's pricing methodology and proxy rate rules. 47 C.F.R. §§51.501-515.
- Procedures for state commission implementation of Section 252, including FCC procedures to be undertaken in the event a state commission fails to "carry out its responsibility under section 252 of the Act." 47 C.F.R. §§ 51.801-808.
- The FCC's "pick-and-choose" rule of 47 C.F.R. § 51.809, which was specifically affirmed by the Supreme Court in the *Iowa* case.

¹¹ 47 C.F.R. §§51.501 through 50.515.

¹² Therefore, despite the vacation of Rule 51.319, Covad cannot be denied the right to obtain unbundled network elements that GTE already provides to itself or to other CLECs. As discussed below, GTE provides itself loops capable of supporting its own retail ADSL service.

Covad believes that the Court's vacation of Rule 51.319 has absolutely *no* impact upon the Commission's ability to arbitrate the open issues of this Agreement. Covad and GTE have already agreed upon several change-in-law clauses. One of these addresses the general situation should the FCC's replacement for the vacated Rule 51.319 define UNEs differently or limit the list of mandated UNEs. This clause states:

In the event GTE is permitted or required to discontinue any Unbundled Network Element provided to Covad pursuant to this Agreement during the term of this Agreement or any such extensions thereto, GTE shall provide Covad 30 days advance written notice of such discontinuance, except as may be otherwise provided herein or required by applicable law. This provision will not alter either Party's right to any notification required by applicable law.

As a result, it is perfectly appropriate for this Commission to approve the Agreement with the unbundling rules as currently drafted and adopt the FCC proxy rates for unbundled loops. Indeed, Covad submits that such a course would be the most efficient use of the time and energies of both the Commission and the parties. Otherwise, this Commission will be required to define and price unbundled elements pursuant to the strictures of Rules 51.317 and 51.501-515 by June 9, 1999—a significant effort that might end up being wasted if the FCC comes out with a modified list of elements later on “this summer.”¹³

In light of the foregoing, Covad fails to understand GTE's unilateral suspension of negotiations. Covad's remaining recourse is to initiate this arbitration and make this request that the Commission find that GTE has violated its duty to negotiate in good faith, pursuant to 47 C.F.R. § 51.301(a), (c)(6) (defining a failure to negotiate in good faith as including “intentionally

¹³ Recent press reports indicate that the FCC intends to complete its review or replacement of Rule 51.319 “sometime this summer.” Kathy Chen, “Established Local-Phone Companies use Ruling's Fine Print to Frustrate Upstarts,” *Wall Street Journal*, Feb. 12, 1999 at B8 (quote attributed to Larry Strickling, chief of the FCC's Common Carrier Bureau).

obstructing or delaying negotiations”). By filing this petition before this Commission, Covad is explicitly not waiving its rights to seek appropriate redress from the FCC or federal courts and to seek consequential damages for GTE’s breach of the Communications Act, pursuant to Sections 208 and 209 of the Communications Act of 1934, as amended.

IV. ISSUES FOR ARBITRATION

Covad submits the following unresolved issues for arbitration. Pursuant to the Act, Covad describes its own position and the latest-known position of GTE (to the extent Covad knows or understands that position). Covad identifies the majority of these issues based on the last complete draft text exchanged with GTE (on or about January 6, 1999) and on more recent communications (fax, e-mail, and voice). Some of the issues raised below have not been discussed with GTE—principally because of GTE's failure to engage Covad in substantive discussions since the *Iowa* decision.

A. Unresolved Issues

Issue 1: Dispute Resolution

Covad’s Position: While Covad supports alternatives to litigation, Covad is unwilling to waive its right to seek relief from a court of competent jurisdiction regarding disputes arising out of, or related to, the Interconnection Agreement.

GTE's Position: GTE has not fully communicated its position on this issue to Covad. Covad believes that GTE's delay in responding to Covad on this point constitutes a failure to negotiate in good faith pursuant to 47 C.F.R. § 51.301(a), (c)(6).

Issue 2: Governing Law

Covad's Position: Covad expects to provide DSL service in competition with GTE in all geographical jurisdictions where GTE is an incumbent local exchange carrier. As a consequence, Covad is unwilling to agree to any language waiving its right to litigate in an otherwise jurisdictionally competent federal district court.

GTE's Position: Covad finds it difficult to fairly represent GTE's position, but believes that GTE wants to require Covad to litigate, irrespective of the nature of the claim, serially in courts located in various states where GTE services are provided or facilities reside.

Issue 3: Limitation of Liability

Covad's Position: Covad firmly believes that (1) neither Covad nor GTE should be able to limit its liability in cases of willful misconduct or gross negligence, and (2) absent willful misconduct or gross negligence, liability should be limited to direct damages without any further limitation relating to monthly charges or other costs or expenses either party might recover in the course of normal operations.

GTE's Position: GTE has not communicated its position on this issue to Covad. Covad believes that GTE's delay in responding to Covad on this point constitutes a failure to negotiate in good faith pursuant to 47 C.F.R. § 51.301(a), (c)(6).

Issue 4: Prices of Unbundled Loops

Covad Position: GTE has proposed the following controlling language in the Unbundled Network Elements section of the Agreement: "The description, prices, terms and conditions that apply to NIDs, loops, ports and local switching, and transport are provided in the Tariff". (The specific tariff reference is to GTE's Oregon tariff P.U.C. OR No. 15. In light of the agreement to use the Oregon Interconnection Agreement as a model in other states, "Tariff" here would refer to relevant tariffs in other states where Covad and GTE are negotiating interconnection agreements.)

Covad will accept incorporation by reference of any comparable GTE Virginia tariff into its Virginia Agreement, provided that such tariff (1) is wholly consistent with applicable orders of the Virginia State Corporation Commission and (2) the tariff and any such state commission orders are consistent with the federal UNE pricing rules, 47 C.F.R. §§51.501 - 51.515.

Since the Virginia State Corporation Commission has not yet adopted rates applicable to GTE that are consistent with the federal pricing rules, Covad believes that the Commission should apply the FCC proxy loop rate of \$14.13¹⁴ to the interconnection agreement the subject of this arbitration until such time as the Commission adopts conforming rates. If the Commission does not take this action, it will either have to complete the cost case required by 47 C.F.R. § 51.511(e)(2) by June 9, 1999, or this arbitration will be removed to the FCC pursuant to 47 C.F.R. §§ 51.801-807. Removal to the FCC will include continued FCC jurisdiction over the Covad-GTE relationship in this state.

Covad believes strongly in the end-user of its services being afforded the maximum choice of high-speed service offerings at competitive prices. With this objective in mind, Covad

¹⁴ See, Table associated with 47 C.F.R. §51.13 (c).

notes that the FCC proxy rates apply to all local loops irrespective of whether they are described as "analog" or "digital" in the ordering process, and irrespective of the type of digital service they will technically support (ISDN, IDSL, ADSL, SDSL, HDSL, VDSL, etc.).¹⁵ The proxy prices of the federal pricing rules do not envision any additional non-recurring charge for local loops.¹⁶

GTE Position: Given GTE's silence since January 25, 1999, Covad is unaware of GTE's present position on the applicability of federal pricing rules.

However, GTE recently submitted proposed local loop rates as directed in the North Carolina Utilities Commission's December 10, 1998 Order Adopting Permanent Rates.¹⁷ As an illustration, GTE proposed rates for ADSL include a non-recurring loop charge of \$99.49 and a recurring monthly loop charge of \$100.27.¹⁸ As is apparent merely from the non-recurring charge, Covad does not believe that the methodology used by GTE to determine those rates is in compliance with the FCC's pricing rules.

Pursuant to a tariff filed at the FCC, GTE currently offers retail DSL at prices as low as \$35 per month with a one year contract, bundled with a special modem and installation promotion enabling an end user to purchase a \$300 modem, service connection separately valued at \$60, inside wiring/modem installation separately valued at \$80, for the consolidated price of

¹⁵ See, 47 C.F.R. §51.501(c): "The rates that an incumbent LEC assesses for elements shall not vary on the basis of the class of customers served by the requesting carrier, *or by the type of services that the requesting carrier purchasing such elements uses them to provide.*" (emphasis added). That rule is, of course, unaffected by the Supreme Court vacating Rule 51.319.

¹⁶ See, 47 C.F.R. §51.507: "The costs of dedicated facilities shall be recovered through flat-rated charges."

¹⁷ North Carolina Utilities Commission Docket No. P-100, SUB 133d.

¹⁸ There appears to be an arithmetic error in GTE's proposed ADSL rate. On the line "Total ADSL rate" in Attachment 1, Schedule 3 to GTE's filing, column "a" (TELRIC) \$89.20 plus column "b" (Common Cost Recovery) \$11.07 do not equal the amount \$80.27 entered in column "c" (Commission Adj. Proposed Rates). Rather, if the summing methodology used regarding other line entries is applied, \$89.20 plus \$11.07 equals \$100.27 instead of the entered amount \$80.27.

\$99, an advertised saving of \$341.¹⁹ Covad finds it bewildering that those retail rates for GTE's DSL service are far below the ostensible "forward-looking" cost of an unbundled conditioned loop.

(Covad is unable to discern any consistency among the proposed prices submitted by BellSouth, GTE, and Sprint in the North Carolina pricing proceeding. The submissions of these companies were ostensibly generated using a common methodology, under a common regulatory regime and under rough equivalency of geographic factors and facilities cost. Moreover, Covad can discern no relationship between their proposed prices for unbundled elements essential for a CLEC to provide competitive DSL service and the ILEC established market price for retail -- except, of course, that only a wizard of legendary proportions could remain in business as an independent provider of competitive DSL under such disparate pricing conditions.)

Issue 5: Nomenclature of Loop and NID

Covad Position: Covad agrees that a loop is an unbundled component of Exchange Service; however, a loop is clearly also an unbundled component of Special Access Service pursuant to the FCC decision in its investigation of GTE's interstate ADSL tariff.²⁰ Similarly, use of a NID should encompass not only the provision of local service, but also the provision of special access service when used by Covad to provide interstate DSL service.

There are related consequential changes that Covad believes should be made in the agreement text in light of this FCC decision. For example, the following provision should be

¹⁹ <http://www.GTE.com/dsl/idsl/dslprice.html>, as of February 11, 1999.

²⁰ Memorandum Opinion and Order, *In the Matter of GTE Telephone Operating Cos. GTOC Tariff No 1 GTOC Transmittal No. 1148*, CC Docket No.98-79, FCC 98-292, October 30, 1998, ¶25.

amended to include the italicized text: "Covad shall be permitted to connect its own Loop directly to GTE's NID in cases in which Covad uses its own facilities to provide local *or special access* service to an end user..."

GTE Position: GTE has yet to respond to Covad's request to amend the nomenclature dealing with loops to read "a loop is an unbundled component of exchange *or special access* service".

Issue 6: Collocation Issues

Covad Position: GTE has proposed controlling language in the Collocation section of the Agreement stating that "GTE will provide such collocation for purposes of interconnection or access to UNEs pursuant to the terms and conditions in the applicable federal and state tariffs". In view of the pending nature of the FCC decision in the Deployment of Wireline Services Offering Advanced Telecommunications Capability proceeding²¹ which include several specific proposals for collocation reform, and GTE's present, potentially, precedent-setting, "no substantive discussion" period following the release of the *Iowa* decision, Covad would accept GTE's proposal if language to the following effect is inserted: "In the event state or federal regulations alter the rates, terms and conditions for the provision of collocation, GTE will accordingly modify its federal and state tariffs to incorporate all such alterations within 30 days of the effective date of such regulations, or within such time period as the regulations themselves may require." Covad believes that this combination of GTE and Covad proposed text is an

²¹ CC Docket No. 98-147.

efficient, simple and self-enforcing means of ensuring that Covad be able to take advantage of any new federal or state collocation rules without renegotiating this Agreement.

Covad has on order, pursuant to federal tariff, collocation in several central offices in Virginia, and expects to place orders for collocation in several central offices in North Carolina within the next two weeks. Covad expects that these collocation orders, and all others submitted pursuant to state or federal tariff, will be processed without delay, and the collocation space will be delivered expeditiously.

GTE Position: Covad can not represent GTE's position on the text proposed above since the need for such a provision has been uniquely demonstrated by GTE's negotiating silence in the aftermath of the *Iowa* decision. However, since it was GTE's proposal to provide collocation in this Agreement solely by reference to tariff, Covad cannot understand why GTE would object to Covad's simple proposal that GTE incorporate in those tariffs the most-recent, up-to-date collocation rules.

Issue 7: Space Planning

Covad Position: Covad maintains that GTE should consider Covad needs and the needs of other CLECs in its facilities planning in order to be consistent with the requirements of 47 C.F.R. §51.323(f)(3): "When planning renovations of existing facilities or constructing or leasing new facilities, an incumbent LIC shall take into account projected demand for collocation of equipment."

GTE Position: GTE maintains "that any final space planning or utilization decision shall be made by GTE in its sole discretion in light of GTE's overall requirements." Covad believes that this position is clearly inconsistent with 47 C.F.R. § 51.323(f)(3).

* * *

Attachment 2 is a matrix outline of the foregoing issues.

* * *

Covad cannot anticipate whether the results of GTE's internal policy review following *Iowa* will lead to additional unresolved issues in addition to the seven outlined above.

B. Miscellaneous Resolved but Outstanding Issues

In the two months prior to the *Iowa* decision, the parties resolved several issues and closed contract language regarding them. This section outlines the status of negotiations between the parties on other miscellaneous issues. Covad is hopeful that once GTE recommences substantive discussions, final contractual language can be agreed quickly. However, Covad reserves the right to address additional issues in more detail with the Commission if the parties are unable to agree on final contract language.

Spectrum Management and Related Change of Law Issues

Covad and GTE engineers continue to consult on spectrum management issues. Covad believes that binder group management (other than segregation of repeatered T-1) is irrelevant to spectrum interference concerns because binder group integrity is not maintained throughout the distribution plant. This position appears to be adopted by major ILECs as evidenced by recent submissions of Bellcore/Bell Atlantic and Ameritech to the national T1/E1 Standards Committee. Covad further believes that advanced services should be provisioned over loops

unless harmful interference will result, and that whatever implementation provisions are ultimately agreed, they should apply to GTE and Covad on a non-discriminatory basis.²²

Covad does not request arbitration of these largely technical issues. Covad and GTE have agreed both a general change of law provision and one related to spectrum management and interference issues. This was done in continuing anticipation that the FCC would address spectrum management and interference matters in the Deployment of Wireline Services Offering Advanced Telecommunications proceeding. Unless delay in that proceeding becomes prolonged, or until technical discussions show no signs of additional progress, Covad would prefer not to arbitrate this issue in this forum at this time.

Covad's understanding of the agreed change of law provisions is that GTE and Covad will move to implement FCC rules on spectrum management without delay unless such rules are stayed by injunctive relief pending appeal. If GTE's understanding is different, it should so state in its response to this Petition.

While legal in nature, an appropriate change of law provision could have significant operational impact on Covad as regards spectrum management. Presently, Covad requests of GTE in California for loops capable of supporting its DSL services are rejected at a rate five (5) times greater than are its loop requests of Pacific Bell in central offices serving areas adjacent to those of GTE. Covad has yet to determine whether this abnormal rejection rate is the result of anti-competitive activities by GTE in the implementation of its spectrum management policy, the result of over-reliance on bad records, or the result of poorly designed loop distribution facilities.

²² See, 47 C.F.R. § 51.309(a): "An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends."

Should the FCC adopt a spectrum management regime similar to that recommended by Covad in the Deployment of Wireline Services Offering Advanced Telecommunications Capability proceeding,²³ and should appropriate change of law provisions be included in its interconnection agreement with GTE in Virginia, Covad would be in a far better position to limit the present deleterious effect of GTE spectrum management policy on end-users wanting to avail themselves of Covad high-speed offerings.

Reimbursement of Expenses

GTE initially proposed a provision that would entitle GTE to reimbursement for all costs it incurred under the Agreement irrespective of whether such costs were specifically described and agreed in the Agreement. Covad objected to the open-ended nature of this provision. Discussions prior to the *Iowa* decision lead Covad to believe that the issue is resolved in principle although specific language has yet to be agreed.

Definition of Dedicated Transport

GTE's proposed definition is restrictive in that it identifies dedicated transport as a facility between designated serving wire centers "within the same LATA." Covad's query has not been answered, but Covad does not anticipate that differences will rise sufficient to be addressed in arbitration.

Service Standards

²³ Covad's comments in that proceeding are available on its web site at http://www.covad.com/about/public_policy.html.

Covad and GTE have agreed that "the Parties shall meet any service standard imposed by the FCC or any state regulatory authority which is applicable to the Parties for services which are provided under this Agreement." Covad believes that there is further agreement on the following: "in addition, GTE shall make available to Covad any service standards or service quality levels which GTE may provide to other CLECs

In present circumstances, and where no provisioning intervals exist that relate to the proxy prices of the federal pricing rules, Covad believes that implementing text should be included in the Agreement requiring a firm order commitment for local loops within 4 hours, and service delivery within 5 days. These intervals are consistent with GTE's obligations to Covad in California. If Covad and GTE are unable to agree on implementing text, Covad will request the Commission to set appropriate service standards for delivery of local loops in this arbitration.

V. RELIEF REQUESTED

Covad requests that the Commission arbitrate the unresolved interconnection issues between Covad and GTE and that the Commission order GTE to enter into and sign an agreement with Covad for interconnection, unbundled network elements, resale and collocation consistent with that ruling.

Covad also requests that the Commission find that GTE has failed to negotiate in good faith pursuant to 47 C.F.R. §§ 51.301(a), (c)(6) because of its deliberate refusal to engage in any substantive negotiations since the Supreme Court's *Iowa* decision on January 25, 1999. Covad requests that this Commission impose whatever remedy it deem appropriate for this behavior. Covad makes this request without waiving its rights to request that the FCC impose fines,

forfeitures and penalties, or to seek consequential federal district court of competent jurisdiction pursuant to Section 209 of the Communications Act of 1934, as amended.

In the event that GTE decides to come into compliance with the law and resumes substantive negotiations, Covad reserves the right to modify this Petition to add additional issues that might arise prior to the conclusion of this arbitration.

Covad does not request a hearing in connection with this arbitration, believing the relief it requests does not present any disputed factual issues.

Covad requests that the Commission assign an arbitrator to this proceeding and that the parties communicate with such arbitrator to establish a reasonable schedule for resolving the issues set forth herein. Covad is also willing to discuss other dispute resolution procedures that the Commission may suggest or propose. In particular, Covad requests that the Commission consider mediation of the issues identified in this Petition.

Since nearly-identical arbitration Petitions are being filed by Covad against GTE today in several states, Covad has no objection if the Commissions of North Carolina, Florida and Virginia consolidate the Covad-GTE arbitration proceedings in a manner that complies with federal statutory requirements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James D Earl", with a stylized flourish at the end.

James D Earl
Assistant General Counsel, Covad Communications
6849 Old Dominion Dr, Suite 220, McLean, VA 22101
jearl@covad.com



September 9, 1998

VIA E-MAIL AND FED-EX:

Sam Jones
GTE Business Development & Integration
HQEO1G33
600 Hidden Ridge
P.O. Box 152092
Irving, TX 75015

Re: OR, TX, FL, VA and NC Interconnection Agreements

Dear Sam:

This letter is to confirm September 22, 1998, as the next negotiation session between GTE and Covad, and to respond to the August 12, 1998, letter from Brandon Becicka attaching the current pricing appendices for GTE interconnection agreements in TX, OR, FL, NC and VA. Please be advised that pursuant to the statutory requirements set forth under 47 U.S.C. Section 252, Covad is hereby formally requesting interconnection negotiations with GTE for the states Florida, North Carolina and Virginia.

I have completed my review of the pricing appendices, as well as the August 21, 1998, letter from Dalene Florez to Dhruv Khanna regarding Covad's cageless collocation proposal. Accordingly, Covad is proposing that the parties be prepared to address and respond to the following issues during the September 22, meeting. Under separate cover, I will send you electronically, Covad's redlined version of the GTE generic agreement for Oregon incorporating the issue listed below. I would request that GTE provide Covad with its responsive proposal prior to the meeting on September 22.

1. Cageless collocation: Covad is still awaiting GTE's response to Covad's cageless collocation proposal. Consistent with the Federal Communications Commission's ("the" FCC") Memorandum Opinion and Order, and Notice of Proposed Rulemaking, FCC 98-188, Covad proposes to include cageless collocation as an additional alternative to GTE's common cageless collocation proposal, and to the existing physical and virtual collocation arrangements currently set forth in GTE's Interconnection Agreements. Covad's Cageless collocation proposal, is separate and distinct from, and not to be confused with GTE's "common or shared" collocation proposal.

2. Loop Pricing: Covad requests that GTE offer to Covad xDSL-capable loops at rates comparable to that of analog loop rates. In Texas, for example, Covad requests GTE to offer Covad term pricing and volume discounts for 2-wire digital loops and or xDSL-capable loops which effectively reduces the non cost-based premium GTE proposes to charge for digital capable loops versus analog loops. Covad contends, that the forward looking incremental costs of digital capable loops is essentially the same to that of an analog loop. Moreover, GTE has filed cost support at the FCC in support of its retail ADSL tariff which supports Covad's contention that digital loops used to provide retail ADSL do not cost more than standard analog exchange service loops.¹ Hence, Covad's renews its request to that GTE negotiate rates for xDSL capable/2-wire digital loops that are comparable to analog loop rates within the applicable state jurisdiction.
3. Spectrum Management: Covad proposes that the parties incorporate a Spectrum Management Appendix that delineates the process by which Covad and GTE would through a collaborative process, develop and implement guidelines for spectrum management which are competitively and technology neutral and further, will not preclude or impeded either carrier from deploying advanced DSL services as required by FCC First Report and Order, para 292 and as contemplated in paragraph 159- 160 of the FCC's NPRM , 98-188.
4. Dispute Resolution: Covad requests Dispute Resolution provisions that are being made available by state PUCs and offered by GTE to other carriers.
5. Performance Metrics: Covad requests Performance Metrics provisions that are being made available by state PUCs and offered by GTE to other carriers.

As an additional matter, Covad seeks clarification regarding GTE's position regarding the Opt-In or MFN process. It has come to my attention a number of state commissions, including the Texas PUC, have and continue to be view and approve such "modified" agreements as an MFN agreement. Covad is willing to address GTE's concerns regarding preserving its legal positions, rights and remedies. However Covad objects to certain portions of GTE's proposed Opt-In Language including, but not limited to, GTE's proposal that the entire interconnection agreement becomes void and not effective should a PUC, the FCC or a court of competent jurisdiction modifies or voids in any way the GTE Opt-In Language.

¹ According to the recurring cost methodology that GTE filed with its FCC Tariff, GTE did not include any loop related costs in its study of ADSL service. GTE's filing, therefore, assumes that the cost of the underlying loop that GTE uses to provide ADSL (i.e., the end user's existing analog loop) will not change in any manner when it becomes a digital loop.

September 11, 1998

I look forward to reviewing GTE's response to Covad's proposed contract language and discussing these matters in depth, during the September 22, 1998 meeting. Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Prince Jenkins", written over a horizontal line.

Prince Jenkins
Senior Counsel
Covad Communications, Co.

cc: Dhruv Khanna, Esq.

Issues Matrix			
Issue	Petitioner Position (Covad)	Respondent Position (GTE)	FCC Rule
Dispute Resolution	Unwilling to waive right to litigate	Unknown	None known
Governing Law	Needs to be able to consolidate litigation if appropriate	Unknown	None known
Limitation of Liability	1. No party should be able to limit liability in cases of willful misconduct of gross negligence. 2. In other cases, liability should be limited to direct damages with no further limitation	Unknown	None known
Prices of NIDs and Loops	In the present absence of state action conforming to federal pricing rules, states should adopt the proxy prices contained in those rules	Unknown	The federal pricing rules (47 C.F.R. §§51.501 - 51.415) are effective following the Supreme Court decision in <i>Iowa</i>
Nomenclature of Loop and NID	Loop and NID nomenclature should include use for Special Access Service	Unknown	FCC ORDER 98-292 (GTE Telephone Operating Companies Tariff No.1) holds interstate DSL to be special access service
Collocation Issues	GTE should commit to bringing federal and state collocation tariffs into compliance with state and federal regulations w/in 30 days of their effective date	Unknown	47 USC 201(b) provides the FCC authority to make rules and regulations as necessary in the public interest to carry out the provisions of the Communications Act. <i>See, Iowa</i> 47 C.F.R.51.501(a) provides that the

			federal rules (47 C.F.R. §§51.501 - 51.515) apply to physical and virtual collocation
Space Planning	GTE must account for CLEC projected demand	GTE will exercise its sole discretion in light of its requirements.	47 C.F.R. §51.323(f)(3) requires an ILEC to take into account projected demand for collocation of equipment.